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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF TEXAS,
Petitioner

vs.

KENNETH EARL JACKSON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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QUESTIONS PRESENTED

I.

Does the Fourteenth Amendment require application of the presumption of judicial vindictiveness stated in *North Carolina v. Pearce*, 395 U.S. 711 (1969) to a case where the judge who imposed the more severe sentence on retrial did not impose the earlier, more lenient sentence and where the first sentencing judge granted the motion for new trial?

II.

Does a single claimed error of ineffectiveness of counsel which results in the assessment of a more severe punishment but which does not deny the defendant a fair trial violate the defendant's Sixth Amendment right to effective assistance of counsel?

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In the

SUPREME COURT OF THE UNITED STATES

THE STATE OF TEXAS,
Petitioner

v.

KENNETH EARL JACKSON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner, the State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas entered in this proceeding on July 24, 1985.

OPINIONS AND ORDERS OF THE COURTS BELOW

The opinion of the Court of Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, dated June 30, 1982, abating the appeal is reported as *Jackson v. State of*

Texas, 640 S.W.2d 323 (Tex. App. — San Antonio 1982, pet. ref'd). This opinion is reproduced in the Appendix. (A-1)

The opinion of the Court of Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, dated November 9, 1983, reversing the conviction is reported as *Jackson v. State*, 662 S.W.2d 74 (Tex. App. — San Antonio 1983, pet. granted). The opinion is reproduced in the Appendix. (A-10)

The opinion of the Texas Court of Criminal Appeals in this cause affirming the action of the Court of Appeals under its Cause Number 115-84, on State's Petition for Discretionary Review, dated July 24, 1985, is printed in the Appendix. (A-17) It is not yet reported.

The order of the Texas Court of Criminal Appeals denying the State's Motion for Rehearing, dated October 16, 1985, is printed in the Appendix. (A-54) It is not reported.

The order of the Texas Court of Criminal Appeals granting a stay of the execution of the mandate, dated October 30, 1985, is printed in the Appendix. (A-55) It is not reported.

JURISDICTION

The Court of Criminal Appeals of Texas rendered its decision on July 24, 1985. A timely filed State's motion for rehearing was denied on October 16, 1985. This petition for writ of certiorari is filed within sixty days after final judgment. The same issues indicated in the Questions Presented have been raised at every level and stage of these proceedings. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI of the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV of the United States Constitution:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 37.07, Code of Criminal Procedure of Texas:

Article 37.07 expresses the statutory requirements regarding the assessment of the punishment upon

a defendant who is convicted in any criminal case other than a misdemeanor case of which the justice court or the municipal court has jurisdiction. Essentially, this statute provides for a bifurcated trial, with the finding of guilt or innocence being the first duty of the jury, with Section 2(b) thereof providing that in the event of a finding of guilty then it is the responsibility of the judge to assess the punishment applicable to the offense. However, the statute in Section 2(b)2 permits the defendant, at the time he enters his plea in open court, to choose as the determiner of his punishment that same jury which determined guilt or innocence. If the defendant makes no election then the trial judge is required to determine and assess punishment if the jury makes a finding of guilty.

Sections 1 and 2 of Article 37.07 are printed in the Appendix. (A-56)

STATEMENT OF THE CASE

Kenneth Earl Jackson, Respondent, was indicted for delivery of heroin. At his first trial Respondent, pursuant to Article 37.07, Texas Code of Criminal Procedure, elected to have the judge assess the punishment. The trial judge, Judge H. Garcia, assessed the punishment as imprisonment for fifteen years—the minimum allowed under the facts. The same judge later granted Respondent a new trial. At the second trial a different trial judge, Judge R. Barrera, Jr., presided and Respondent this time elected to have the jury assess the punishment. After a finding of guilt

the jury assessed punishment as imprisonment for twenty-five years.

Respondent timely perfected his appeal to the Court of Appeals for the Fourth Supreme Judicial District of Texas. On appeal, he complained that his trial counsel provided ineffective assistance of counsel by advising Respondent to elect to go to the jury for punishment. Respondent claimed that the prophylactic rule of *North Carolina v. Pearce*, 395 U.S. 711 (1969) would have barred Judge Barrera from assessing punishment greater than fifteen years. The Court of Appeals of the Fourth Supreme Judicial District of Texas remanded the cause to the trial court for a hearing to determine if objective information could have been made available to the trial court which would have supported a more severe assessment of punishment and, therefore, provide a reasonable basis for trial counsel's action.

At the hearing, Respondent and his trial counsel, Warren Wolf, testified. Respondent testified that prior to his second trial he asked his counsel whether it would be better for the judge or the jury to assess punishment. He had heard that one or the other could not impose more time than that given at the first trial. He stated Mr. Wolf did not know but would check into the matter. When the election was required to be made, the Respondent again questioned his counsel about the choice. Mr. Wolf recommended the jury because the judge was trying to make a name for himself. Mr. Wolf also testified. He stated that he had discussed the election with the Respondent. He advised that the jury be selected because the judge would be harsher because of the judge's upcoming election. He concluded there was no other reason for his advice.

After reviewing the evidence introduced at the hearing, the Court of Appeals determined there was no objective information concerning identifiable conduct of the appellant which would have allowed the trial court to impose a more severe punishment. The Court found no tactical reason for Respondent's trial counsel advising his client to choose the jury and concluded that because of this single error Respondent's trial counsel had provided ineffective assistance of counsel. The judgment was reversed and the cause remanded for a new trial.

Petitioner timely sought review by petition to the Court of Criminal Appeals of Texas. The Court of Criminal Appeals affirmed the Court of Appeals' decision. It likewise determined that the prophylactic rule of *Pearce* applied to this cause and, in the absence of objective information concerning identifiable conduct on the part of the appellant after the first trial, punishment by the trial court could not have been greater than fifteen years. The Court agreed there was no evidence of such conduct. Thus, it was held there was no reason to go to the jury and trial counsel's failure to advise appellant about the impact of *Pearce* was ineffective assistance of counsel. The Court determined that the single omission by trial counsel required reversal.

REASON FOR GRANTING THE WRIT

I.

THERE IS NO REASONABLE LIKELIHOOD OF VINDICTIVENESS AT RETRIAL WHERE THE SENTENCING JUDGE OF THE FIRST TRIAL GRANTED DEFENDANT'S MOTION OF NEW TRIAL AND A DIFFERENT SENTENCING JUDGE PRESIDED AT RETRIAL.

In assessing whether Respondent's trial counsel failed to provide effective assistance of counsel, the Court of Criminal Appeals of Texas addressed the application of the presumption of judicial vindictiveness established in ***North Carolina v. Pearce***, 395 U.S. 711 (1969).[1] The Court concluded that the presumption applied in a situation where on retrial a trial judge assessed a harsher sentence even though a different judge imposed the first and more lenient sentence and later granted the defendant's motion for new trial. The Court of Criminal Appeals of Texas concluded that the trial judge upon retrial was "locked into giving" the sentence imposed at the first trial. This factual situation of a new trial granted by one judge when another presides at the retrial occurs frequently in the Texas courts as well as in other jurisdictions. The Court of Criminal Appeals of Texas' broad application of the presumption of judicial vindictiveness imposes a severe and unwarranted restriction upon the discretion of a trial judge in assessing punishment at retrial. This cause, as well as ***The State of Texas v. Sanford James McCullough***, ____ S.W.2d ____ (Tex. Crim. App. Cause No. 351-83 decided December 5, 1984), cert. granted, 53 U.S.L.W. 3869 (U.S. June 10, 1985) (No. 84-1198) currently pending before this court, offer an opportunity to clarify the application of the presumption of judicial vindictiveness.

In ***Pearce*** the defendant's first conviction was reversed on

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[1]The Petitioner below has argued that ***Pearce*** was not applicable to the facts of this cause. Thus, even assuming trial counsel was completely unaware of ***Pearce*** no ineffectiveness occurred. It was in this context that the Court of Criminal Appeals of Texas rendered its holding regarding ***Pearce***.

appeal. On retrial the punishment imposed by the trial judge was greater than that imposed at the first trial. This Court noted that the threat or application of a punitive policy against a defendant exercising a statutory right of appeal or collateral remedy would chill the exercise of that right. It was acknowledged that it would be difficult to establish that the greater sentence was the result of a retaliatory motive or judicial vindictiveness. In response, a prophylactic rule against greater punishment was created unless there was objective information concerning identifiable conduct on the part of the defendant occurring after the time of the first sentencing. Thus, "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." 395 U.S. at 725, 726.

Since the *Pearce* decision, the application of the presumption has been narrowed, not widened. In *Wasman v. United States*, 468 U.S. ____, 82 L.Ed.2d 424, 104 S.Ct. 3217 (1984) it was noted that the Court had been "chary" about extending the presumption of vindictiveness when there was less likelihood of vindictiveness. It was stated in *United States v. Goodwin* 457 U.S. 368, 373 (1982) "Given the severity of such a presumption, however—which may operate in the absence of any proof of an improper motive and thus block a legitimate response to criminal conduct—the Court has done so only in cases in which a reasonable likelihood of vindictiveness exists." Since the *Pearce* decision, several factors have been identified to determine if there is reasonable likelihood of vindictiveness.

In *Colten v. Kentucky*, 407 U.S. 104 (1972) the defendant received a trial *de novo* in a court of general jurisdiction which resulted in a greater sentence after the defendant had appealed

from the judgment of an inferior court. The Court stated that the two-trier system did not create the same possibility of vindictiveness. It was noted that a different court conducted the second trial, that the first court was not asked to do over what it thought it had already done correctly, and that another court was not asked to find error with the first court's work. The Court concluded that the imposition of *Pearce*'s prophylactic rule was inappropriate.

In *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) the larger sentence upon retrial was imposed by a jury. The Court found that the possibility of vindictiveness was *de minimis*. It was noted that the jury at the second trial is usually unaware of the prior trial. Also, the second sentencing authority was not the same as the first whose handling of the prior trial was sufficiently unacceptable to have required a reversal. The jury had no personal stake in the prior conviction and no motive to engage in self-vindication. Finally, it was observed that a jury would be unconcerned with the institutional interest of discouraging meritless appeals. Again, no real threat of vindictiveness was found.

Applying the factors outlined above to a situation where the first sentencing judge grants a new trial and a different judge presides at retrial, it is apparent there is no reasonable likelihood of vindictiveness. First, the original sentencing judge granted the new trial. No other court was asked or required to review the action of the trial court. There would be no motivation to punish because of the embarrassment of being reviewed by another tribunal and found to have erred. There would be no embarrassing edict from a higher court criticizing the trial court's action. The error, whether the trial court's or not, is quietly

acknowledged and rectified. Second, a different judge presided over the second trial. A different sentencing authority would have assessed the greater punishment. The second judge would have no personal stake in the prior trial and he would not be asked to retry a case he believed he had already correctly disposed. There would be no motivation to vindicate the first judge through a harsher sentence by the second judge since the first judge would have already acknowledged the error. Third, no institutional interests would be involved. There could be no motivation by the second trial judge to discourage meritless appeals—no appeal was taken and the contention obviously had merit.

Only one factor in favor of the application of the presumption of vindictiveness exists — awareness of the prior trial and sentencing. However, this factor alone is not sufficient to demonstrate a reasonable likelihood of vindictiveness. In *Colton* the sentencing judge was aware of the first sentence, See 407 U.S. at 118, note 14; 126. Something other than the mere knowledge of the first sentence must exist in order to justify the imposition of the presumption of vindictiveness. Otherwise the second trial judge would be forever "locked in" to the decision of the first trial judge and destroy the second trial judge's ability to consider the full range of punishment. In the absence of any other factors suggesting a reasonable likelihood of vindictiveness, it should not be presumed that a different and harsher sentence was imposed for any reason other than the differing views between sentencing judges as to what is appropriate punishment for the alleged offense. Under the factual situation posed, no reasonable likelihood of judicial vindictiveness exists. The *Pearce* presumption should not be applied.

II.

A CLAIMED ERROR OF INEFFECTIVE ASSISTANCE OF COUNSEL WHICH RESULTS IN A GREATER PUNISHMENT BUT DOES NOT DENY A DEFENDANT A FAIR TRIAL DOES NOT VIOLATE THE SIXTH AMENDMENT.

Even if it is assumed that the prophylactic rule of *Pearce* applied to the facts of this case, further assumed that counsel was unaware of the impact of *Pearce* and failed to advise his client about *Pearce*, and finally assumed that the failure to advise resulted in the assessment of a greater punishment, a violation of the Sixth Amendment right to effective assistance of counsel is not brought into question unless the defendant was denied a fair trial. The right to effective assistance of counsel is not recognized for its own sake, but because of the effect it has on the ability of an accused to receive a fair trial. *United States v. Chronic*, ____ U.S. ____, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984). In *Strickland v. Washington*, ____ U.S. ____, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) the Court emphasized:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

The single claimed error in this cause under the totality of the circumstances did not deprive the defendant of a fair trial. Rather, it resulted in a different sentencing body assessing the punishment. That the sentencing body, without the restriction of *Pearce*, was allowed to assess a greater punishment did not

render the determination of punishment unjust. The prosecution with regard to punishment was subjected to a meaningful adversarial testing before the jury. Counsel's claimed error did not undermine the reliability of the jury's determination of what was an appropriate punishment for this offense under the facts of this cause. This Court has long recognized that the Constitution guarantees a criminal defendant only a fair trial and a competent attorney. "It does not insure that defense counsel will recognize and raise every conceivable constitutional claim." ***Engle v. Isaac,*** 456 U.S. 107, 134 (1982). The Court of Criminal Appeals of Texas with its decision has held that trial counsel's sole failure to recognize a conceivable constitutional claim denied the defendant his Sixth Amendment right to effective assistance of counsel. Such a holding is a grave departure from the principles recently announced in ***Chronic*** and ***Strickland.***

Strickland created a two component analysis in assessing a defendant's claim that his counsel's performance was so defective as to require reversal. The first component is that defendant's counsel's performance was deficient. The Court of Criminal Appeals of Texas determined that trial counsel's performance was deficient for a single error. The single error by counsel was his failure to recognize the application of ***Pearce*** to the facts in this cause. However, such a failure is entirely reasonable given the confused state of the application of the presumption of vindictiveness and his representation was within the range of competence demanded of attorneys in criminal cases.

The remaining component of ***Strickland*** requires that any deficiencies in counsel's performance actually had an adverse effect on the outcome of the proceeding. In determining this

component the Court of Criminal Appeals of Texas concluded that the trial judge was "locked into giving the minimum sentence." However, such a determination is nothing more than pure speculation. It requires the presumption that *Pearce* applied, that the trial judge would have acknowledged that *Pearce* applied, and that the trial judge would determine that there was no identifiable conduct or intervening event to justify a greater punishment. Such a string of presumptions is far too tenuous to establish that but for counsel's error the punishment would have been fifteen years. There is an equally reasonable probability that the trial court would have assessed a greater sentence than fifteen years. To permit the assumption that a trial judge would assess the minimum punishment when the entire range of punishment was available to him would destroy the second component of *Strickland*.

In sum, the decision by the Court of Criminal Appeals of Texas will require a counsel to a criminal defendant to foresee and raise all possible constitutional claims, seriously alter the determination of prejudice to a defendant, and all this without regard as to whether the defendant received a fair trial.

CONCLUSION

For these reasons, Petitioner prays that a writ for certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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APPENDIX

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NO. 04-81-00373-CR
IN THE COURT OF APPEALS
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS
SAN ANTONIO
JUNE 30, 1982

KENNETH EARL JACKSON, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

Appeal from Bexar County

Before Fred V. Klingeman, Associate Justice, Shirley W. Butts, Associate Justice, and John E. Clark, Associate Justice

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This appeal is from a conviction for the delivery of heroin as a repeater from a second trial for the same offense.[1] At the first trial appellant was found guilty of the offense of delivery of heroin and determined to be a repeat offender. The court assessed punishment at fifteen years confinement, the minimum punishment for this first degree felony offense. See TEX. PENAL CODE ANN. § 12.42(c) (Vernon 1974). At the second trial appellant elected to have the jury assess his

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1. After the first trial in this cause, the trial court granted appellant a new trial pursuant to former TEX. CODE CRIM. PRO. ANN. art. 40.09(12) (Vernon 1979).

punishment. Appellant pled "true" to the State's prior enhancement allegation at the beginning of the hearing on punishment. After the State presented evidence, the jury found the enhancement allegation to be true and assessed punishment at twenty-five years confinement.

The State's principal witness was an undercover San Antonio Police Officer, Philip Jefferson, who arrested the appellant. Jefferson testified that appellant gave him a white, clear-colored capsule which had some powdery substance in it. He stated further that the capsule was supposed to contain heroin. In response to the question "What did you do with that capsule?", the officer said that he took it to Detective Bratton and turned it over to him.

When asked to identify State's exhibit number two, Officer Jefferson testified that it was a plastic container with his initials on the bottom. The capsule was placed inside this plastic container. After stating that he gave this capsule to Detective Bratton on the same day as the arrest of appellant, Officer Jefferson identified State's exhibit number three as a white envelope with his initials on it. He also testified that once the capsule was placed in the plastic bag it was then put into a white envelope which he initialed, sealed, and released to Detective Bratton. Detective Bratton took it to the medical examiner's office. Further, Officer Jefferson testified that this was the only capsule he had in his possession that day.

After Detective Bratton identified State's exhibits number two and three as containing the capsule he received from Officer Jefferson, he testified that he returned the white envelope (State's exhibit number three which contained State's exhibit number

two which contained the capsule given to him by Officer Jefferson) to the Narcotics Bureau where it was placed inside a brown envelope. The brown envelope was marked State's exhibit number four. When questioning Detective Bratton about this evidence, the prosecutor stated that this evidence was placed under laboratory number N-2973. Later, when the prosecutor was questioning the chemist about the same evidence, he established that the evidence was placed under laboratory number N-7392. Notwithstanding this discrepancy with respect to the laboratory numbers, the chemist stated that an examination of the contents of State's exhibit number two revealed that it contained heroin.

Appellant's fourth ground of error alleges that the evidence is insufficient to prove that the capsule which appellant allegedly delivered contained heroin. We address this ground of error first because a favorable ruling for appellant would result in a reversal and dismissal of this cause. Specifically, apellant complains that although Officer Jefferson identified State's exhibit number two as a plastic container where the capsule was placed, he did not state that it was the same capsule he received from appellant. Appellant asserts that Jefferson had had other capsules on his person on other occasions. Further, appellant argues that although Jefferson gave the capsule he received from appellant to Detective Bratton, neither Jefferson nor Bratton testified that he gave State's exhibit number two to Bratton. Appellant poses this argument notwithstanding the fact that Bratton also identified State's exhibit number two. Finally, appellant argues that State's exhibit number two was placed in an envelope and apparently placed under laboratory number N-2973. Appellant asserts, however, that the only testimony showing any substance to be heroin was that controlled by laboratory number N-7392.

As a result, appellant concludes that heroin was never otherwise tied to appellant or to State's exhibit number two.

At first glimpse the case which appears to be analogous to the case at bar is Jones v. State, 538 S.W.2d 113 (Tex. Crim. App. 1976). In Jones, the defendant, who was convicted of the offense of possession of heroin, complained in his sole ground of error that the evidence was insufficient because a chain of custody for the subject heroin had not been established. The Court of Criminal Appeals agreed and reversed the judgment.

Reviewing the evidence, the court in Jones pointed out that the arresting officer saw the defendant throw a balloon from the driver's window of a car he was operating. The officer seized the balloon and found inside a brownish, powdery substance which, based upon his experience, was heroin. He testified he arrested the defendant, initialed the balloon, took the defendant to the police station, and delivered the balloon to the police chemist. The officer was not asked to identify any balloon as being the same one he seized and initialed.

The police chemist testified that the arresting officer delivered to him a balloom filled with a substance which he later determined contained heroin. The police chemist then identified State's exhibit number one as a plastic bag containing the balloon delivered to him by the arresting officer. The police chemist also identified his own ititials on the balloon. Thereafter, State's exhibit number one was admitted in evidence over the defendant's objection that a proper chain of custody had not been established.

The Court of Criminal Appeals' decision that the evidence

was insufficient to show that appellant possessed heroin on the date charged was based upon the following rationale:

(1) State's exhibit number one was not shown to or identified in any manner by the arresting officer;

(2) the chemist's identification of the balloon as one delivered to him by the arresting officer is not legally sufficient to show that the balloon was the balloon seized by the arresting officer after he saw the defendant throw it from a car;

(3) therefore, there was no showing that State's exhibit number one was in any manner connected to the defendant.

The facts in the case at bar are distinguishable. State's exhibit number two was identified by the arresting officer as a plastic container with his initials where the capsule was placed. He then identified State's exhibit number three as a white envelope with his initials. The arresting officer testified when identifying State's exhibit number three that once the capsule was placed in a plastic bag it was then placed into a white envelope which he initialed, sealed, and released to Detective Bratton.

Since the arresting officer clearly stated that he only had one capsule in his possession on the day he arrested appellant and that he delivered the capsule to Detective Bratton the same day, there is no question that the capsule delivered to Detective Bratton was the same capsule placed in the plastic container (State's exhibit number two) and then placed in the white envelope (State's exhibit number three) and released to Detective Bratton. Therefore, the evidence did establish that State's exhibits

number two and three contained the capsule that the arresting officer took from appellant on the day of the arrest.

In response to appellant's argument based upon the discrepancy in laboratory numbers, it is clear that the testimony of the chemist states that he examined the contents of State's exhibit number two and determined the substance contained therein to be heroin. Therefore, the evidence does establish that State's exhibit number two contained the capsule given to Officer Jefferson by appellant and the capsule contained heroin. Having determined that there was sufficient evidence to prove that the capsule appellant delivered to Officer Jefferson contained heroin, appellant's fourth ground of error is overruled.

Appellant complains in his first ground of error that trial counsel rendered ineffective assistance to him by failing to advise him sufficiently as to the consequences of electing to have the jury assess punishment. Appellant contends that pursuant to TEX. CODE CRIM. PRO. ANN. art. 37.07, § 2(b)(2) (Vernon 1981), as well as North Carolina v. Pearce, 395 U.S. 711 (1969), and Miller v. State, 472 S.W.2d 269 (Tex. Crim. App. 1971), he was entitled as a matter of right to have the trial court assess his punishment and to be assured the punishment would not exceed fifteen years confinement. Appellant argues that his election to have the punishment assessed by the jury, which was not limited to the minimum punishment of fifteen years, see Chaffin v. Stynchcombe, 412 U.S. 17 (1973); Curlin v. State, 505 S.W.2d 889 (Tex. Crim. App. 1974), can only be the result of ineffective assistance of trial counsel. Appellant bases this argument on the rationale that fifteen years confinement was the minimum punishment for a first-degree felony, enhanced by a prior felony conviction. See TEX. PENAL CODE ANN. § 12.42(c) (Vernon

1974). As a result, appellant could not gamble that the jury would assess a lower punishment than he received at the first trial. Thus appellant asserts that he had no reason to go to the jury for punishment and it should be conclusively presumed that his election to do so was because his trial counsel failed to advise him sufficiently to the contrary.

Appellant acknowledges that ordinarily a single inaction by trial counsel will not result in a finding of ineffective assistance as a matter of law. Rather, the general rule is that a determination of ineffective assistance should be gauged by the totality of the representation. See Mercado v. State, 615 S.W.2d 225 (Tex. Crim. App. 1981); Archie v. State, 615 S.W.2d 762 (Tex. Crim. App. 1981).[2] Appellant argues, however, that there should be an exception to this general rule where a single inaction of trial counsel materially harms the accused and there is absolutely no reasonable basis for counsel's inaction. Appellant submits that under such circumstances trial counsel should be deemed ineffective as a matter of law.

Asserting that this case presents one of those rare instances where trial counsel's ineffectiveness is clear despite the absence of evidence showing whether counsel had a reasonable basis for this inaction, appellant requests this court to reverse the

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2. Following the general rule that a determination of ineffective assistance of trial counsel should be determined by the totality of the representation, appellant presents two additional grounds of error alleging that his trial counsel was ineffective.

judgment and remand the case for a new trial.[3] In the alternative, appellant asks this court to abate the appeal and remand the case to the trial court for a hearing to determine whether or not trial counsel's inaction had a reasonable basis.

Appellant's contention that he was entitled as a matter of right to have the trial court assess his punishment and to be assured the punishment would not exceed fifteen years confinement is without merit. In order to prevent "vindictiveness against a defendant for having successfully attacked his conviction" North Carolina V. Pearce, 395 U.S. 711 (1969), requires "that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reason for doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentence." Id. at 726. In the case at bar appellant's attorney may have been aware of "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentence" which might have caused the trial judge to assess a greater sentence upon appellant than the fifteen years confinement imposed at the first trial. If so, there would be a reasonable basis for trial counsel permitting appellant to elect to have the jury assess punishment and appellant's argument of ineffective assistance of counsel would be without merit. Therefore, a

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3. Appellant points out that because punishment was decided by the jury a remand as to punishment only is not permitted. See Eads v. State, 598 S.W.2d 304 (Tex. Crim. App. 1980); Daniel v. State, 585 S.W.2d 688 (Tex. Crim. App. 1979).

hearing should be conducted in the trial court to establish whether objective information could have been made available to the trial court which might have resulted in the imposition of a more severe punishment than the fifteen years assessed at the first trial and thereby determine whether there was a reasonable basis for trial counsel's action. As a result, this appeal is abated and a hearing ordered in the trial court for this purpose.[4]

FRED V. KLINGEMAN,
Associate Justice

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4. The Court of Criminal Appeals has followed such a procedure in Kincaid v. State, 500 S.W.2d 487 (Tex. Crim. App. 1973), and Hullum v. State, 415 S.W.2d 192 (Tex. Crim. App. 1966), in order to obtain additional information from the trial court.

APPEAL NO. 04-81-00373-CR
IN THE COURT OF APPEALS
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS
SAN ANTONIO

KENNETH EARL JACKSON, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

From the 144th District Court of Bexar County
Trial Court No. 80-CR-0934
Honorable Roy R. Barrera, Jr., Judge Presiding

Before Shirley W. Butts, Associate Justice, Blair Reeves, Associate Justice, and Preston H. Dial, Jr., Associate Justice

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This is an appeal from a conviction for delivery of heroin. This court abated the appeal in order that an evidentiary hearing might be held to develop facts regarding appellant's allegation of ineffective assistance of counsel. See Jackson v. State, 640 S.W.2d 323 (Tex. App. — San Antonio 1982, pet. ref'd). The facts of this appeal are fully stated in Jackson, supra, however, for clarity they will be repeated here insofar as relevant.

Appellant was first tried and convicted of the offense of delivery of heroin. He was determined to be a repeat offender

and sentenced by the court to the minimum punishment allowable, fifteen (15) years. TEX. PENAL CODE ANN. § 12.42(c) (Vernon 1974). Pursuant to former TEX. CODE CRIM. PRO. ANN. art. 40.09(12) (Vernon 1979), the trial court granted appellant a new trial. It is from the second trial which appellant brings this appeal. Appellant's first three grounds of error[1] all allege ineffective assistance of counsel. Because of our disposition of appellant's first ground of error, we need not consider grounds two and three.

Appellant in ground of error one, contends that trial counsel rendered ineffective assistance by failing to advise appellant sufficiently as to the consequences of electing to have the jury assess punishment. It was on this ground of error that the appeal was abated for an evidentiary hearing. Jackson, supra at 327. After examining the statement of facts of this hearing, we agree with appellant and sustain his first ground of error.

Because appellant was sentenced by the court at his first trial, absent objective information concerning identifiable conduct on the part of appellant occurring after the time of the original sentencing, the trial judge could not impose a more severe sentence. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); Ex parte Bowman, 523 S.W.2d 677 (Tex. Crim. App. 1975). Appellant, at his second trial, elected to go to the jury on punishment and pled true to the State's enhancement allegation. The jury sentenced appellant

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1. Appellant's fourth ground of error was overruled previously by this court in Jackson v. State, 640 S.W.2d 323 (Tex. App.—San Antonio 1982, pet. ref'd).

to twenty-five (25) years' confinement. The evidentiary hearing ordered by this court reveals no objective information concerning identifiable conduct of the appellant which would have allowed the trial judge to impose a more severe punishment. Appellant testified at this hearing that he had heard from another inmate, after appellant was granted a new trial, "that one of them [the judge or jury] would have to, if they was [sic] to find me guilty again, that one them couldn't give me more time than I had.... I forgot which one it was, and that's what made me ask my attorney." At the evidentiary hearing, appellant's trial counsel testified that the dicision to have the jury assess punishment came about as follows:

> A: [Appellant's Attorney]: before we started the trial we had to make an election as required, and we discussed it back and forth as to what would be the best way to go. And at that time the decision was made to go to the jury.
>
> Q: Did you advise Mr. Jackson to go to the jury specifically?
>
> A: Specifically, no. I remember discussing it with him. If I recall, it was during the time of the Judge's election campaign, and I believe we discussed the fact that the judge would be harsher on him, perhaps, than the jury would, and because of headlines, and what have you, that would arise out of the trial. And the decision was made to go to the jury.
>
> * * *

Q: Okay. Did you at any time — do you remember telling Mr. Jackson that you didn't know which it would be better to go to for sentencing? In other words, did you feel confident with your suggestion to go to the jury?

A: Yes.

Q: Why did you recommend going to the jury?

A: I just explained it.

Q: For the election reasons?

A: Yes.

From this testimony it is evident that appellant relied on his attorney's advice to go to the jury for punishment.

The standard of competence for criminal defense attorneys, whether retained or appointed, has been established as "reasonably effective assistance of counsel." Cuyler v. Sullivan, 443 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); Ex parte Duffy, 607 S.W.2d 507, 516 (Tex. Crim. App. 1980). This does not, however, mean errorless counsel, and the representation is not to be judged by hindsight. Ex parte Robinson, 639 S.W.2d 953 (Tex. Crim. App. 1982); Mercado v. State, 615 S.W.2d 225 (Tex. Crim. App. 1981). The effectiveness of counsel's representation must be judged by the totality of the representation. Archie v. State, 615 S.W.2d 762, 765 (Tex. Crim. App. 1981); Boles v. State, 598 S.W.2d 274, 279 (Tex. Crim. App.

1980). From this it follows that isolated failures to object will not render counsel ineffective. Archie supra at 765.

In order for a criminal defense lawyer to render reasonably effective assistance, he must have a firm command of not only the facts of the case but also the law governing the client's particular situation. Ex parte Duffy, supra at 516; Ex parte Burns, 601 S.W.2d 370, 372 (Tex. Crim. App. 1980).

Viewing the assistance which appellant received from his trial counsel by the above standards, we hold appellant was, as a matter of law, denied effective assistance of counsel. It is true that in the case before us we have singled out one error of counsel upon which we base this holding. In our opinion, however, this single error of counsel permeates the entire proceeding below and demonstrates an obvious lack of knowledge of the applicable legal principles governing punishment on retrial by appellant's attorney. Because of counsel's erroneous advice, appellant made a decision which resulted in a sentence ten years greater than he would have received had he gone to the court for punishment. There can be absolutely no tactical reason for this choice. By going to the jury appellant had everything to lose and nothing to gain since the minimum sentence which the jury could impose was the maximum the court could have imposed. North Carolina v. Pearce, supra.

Since the jury assessed punishment, this court cannot merely remand the case to the court below to assess punishment as this would result in an incomplete verdict. Bullard v. State, 548 S.W.2d 13 (Tex. Crim. App. 1977); Ellison v. State, 432 S.W.2d 955 (Tex. Crim. App. 1968). Thus, we are constrained to

reverse and remand this case for a new trial.

BLAIR REEVES,
Associate Justice

DISSENTING OPINION
KENNETH EARL JACKSON, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

I respectfully dissent.

Appellant is complaining that he was misled to elect punishment by the jury. Contained within that complaint, of necessity, is his desire to have the benefit of North Carolina v. Pearce 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), placing a ceiling of 15 years on the possible punishment. TEX. PENAL CODE ANN. § 12.42(c) (Vernon 1974) places a minimum of 15 years on appellant's punishment. Rather than remand for a new trial, I would reform the punishment to 15 years.

Bullard v. State, 548 S.W.2d 13 (Tex. Crim. App. 1977) and Ellison v. State, 432 S.W.2d 955 (Tex. Crim. App. 1968) do not involve election of punishment by judge or jury and therefore should not control this unique situation.

PRESTON H. DIAL, JR.
Associate Justice

KENNETH EARL JACKSON,
Appellant

No. 115-84 v.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review from the Court of Appeals, Fourth Supreme Judicial District of Texas [BEXAR COUNTY]

OPINION ON STATE'S PETITION
FOR DISCRETIONARY REVIEW

This is an appeal from a conviction for delivery of heroin, a first degree felony. See Art. 4476-15, §4.03(b), V.A.C.S. Punishment, enhanced by proof of a prior felony conviction, was assessed by the jury at twenty-five years confinement in the Texas Department of Corrections.

This appeal arises from appellant's second trial for the same offense. At the first trial, appellant was convicted of delivery of heroin, found to be a repeat offender, and punishment was assessed by the court at the statutory minimum allowable upon proof of a prior felony conviction, fifteen years confinement in the Texas Department of Corrections. See V.T.C.A. Penal Code, §12.42(c). Pursuant to former Art. 40.09(12), V.A.C.C.P., however, the trial court subsequently granted appellant a new trial.

In January, 1981, appellant was retried and again convicted of delivery of heroin. Appellant pled true to the enhancement allegation and elected to have the jury assess punishment pursuant to Art. 37.07, §2(b)(2), V.A.C.C.P. Punishment, enhanced by proof of a prior felony conviction, was

assessed by the jury at twenty-five years confinement in the Texas Department of Corrections.

On direct appeal, appellant attacked the sufficiency of the evidence and, in three grounds of error, alleged trial counsel had rendered ineffective assistance. On June 30, 1982, the San Antonio Court of Appeals held that the evidence was sufficient to sustain the conviction, but abated the appeal in order that an evidentiary hearing might be held to develop facts regarding appellant's first ground of error. Jackson v. State, 640 S.W.2d 323 (Tex. App.—San Antonio 1982, pet. ref'd). Apellant's first ground of error alleged that trial counsel had rendered ineffective assistance by failing to sufficiently advise him as to the consequences of electing to have the jury assess punishment.

On August 26, 1983, an evidentiary hearing was held, developing facts germane to appellant's claim of ineffective assistance. The instructions from the court of appeals, as read to the parties by the trial judge, were:

> "A hearing should be conducted in the trial Court to establish whether objective information could have been made [sic] to the trial court which might have resulted in the imposition of a more severe punishment than the 15 years assessed at the first trial, and thereby determine whether there was a reasonable basis for trial counsel's action." [Emphasis supplied]

The State had full opportunity at that hearing to present all "objective information" it could, including a continuance to bring an additional witness.

On November 9, 1983, with one justice dissenting as to the remedy, the San Antonio Court of Appeals held that appellant's trial counsel had rendered ineffective assistance of counsel and reversed the conviction. Jackson v. State, 662 S.W.2d 74 (Tex. App.—San Antonio 1983). The court of appeals noted that because appellant was sentenced by the court at his first trial, absent objective information concerning identifiable conduct on the part of the appellant occurring after the time of the original sentence, the trial judge could not impose a more severe sentence that the minimum of 15 years under North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), and its progeny. By electing to have the jury assess punishment, however, appellant exposed himself to the full range of punishment applicable to a repeat offender (15 to 99 years, or life). See Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973). Upon reviewing the record of the evidentiary hearing, the court of appeals held that there was no objective information concerning identifiable conduct of the appellant which would have allowed the trial judge to impose a more severe sentence; that appellant's trial counsel failed to sufficiently advise him as to the consequences of electing to have the jury assess punishment; and that, even though effectiveness of counsel is to be judged by the totality of the representation, this single error so permeated the proceedings that appellant's counsel was ineffective as a matter of law.

We granted the State's petition for discretionary review to examine the court of appeals' holding that a single error may constitute ineffective assistance as a matter of law and to review the State's contention that there was a tactical reason for appellant's election because there existed objective information of identifiable conduct by appellant occurring after his first trial

sufficient to authorize a more severe sentence by the trial judge. We affirm the decision of the court of appeals.

In North Carolina v. Pearce, supra, a defendent, whose conviction was reversed on appeal, received a longer sentence from a judge on retrial than that originally imposed by a judge in the first trial. The Supreme Court held that it would be a violation of the Due Process Clause of the Fourteenth Amendment for a trial court to impose a harsher sentence upon a reconvicted defendant for the explicit purpose of punishing a defendant for successfully attacking his original conviciton. Noting the difficulty in proving a retaliatory motive and actual vindictiveness in any given case, the Court found it necessary to establish a prophylactic rule to protect a defendant from the reasonable apprehension of vindictiveness that could deter him from appealing his conviction:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." (Footnote omitted.)
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must

> affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."

Id. at 725-26, 89 S.Ct. at 2080-81. Since its inception, this Court has frequently applied the doctrine of Pearce. Lechuga v. State, 532 S.W.2d 581 (Tex. Crim. App. 1976); Moore v. State, 527 S.W.2d 529 (Tex. Crim. App. 1975); Bingham v. State, 523 S.W.2d 948 (Tex. Crim. App. 1975); Ex parte Bowman, 523 S.W.2d 677 (Tex. Crim. App. 1975); Payton v. State, 506 S.W.2d 912 (Tex. Crim. App. 1974); Miller v. State, 472 S.W.2d 269 (Tex. Crim. App. 1971).[1] See also, Palm v. State 656 S.W.2d 429 (Tex. Crim. App. 1981).

In Chaffin v. Stynchcombe, supra, the Supreme Court reaffirmed the doctrine of Pearce where the punishment on retrial is assessed by the judge, but held that a higher punishment assessed by a jury at a second trial does not "offend the

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1. Recently, in McCullough v. State ____ S.W.2d ____ (Tex. Crim. App. No. 351-83, delivered December 5, 1984)(Opinion on Rehearing), cert. granted (June 10, 1985), we reaffirmed our decision in Miller, supra, holding that the presumption of vindictiveness established by Pearce, when a greater sentence is imposed following retrial, is applicable where a jury assesses punishment at the first trial, and a judge assesses punishment upon retrial.

Due Process Clause so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness." Id. at 35, 93 S.Ct. at 1987. Both before and after Chaffin this Court has reached the same result. Weeks v. State, 521 S.W.2d 858 (Tex. Crim. App. 1975); Fairris v. State, 515 S.W.2d 921 (Tex. Crim. App. 1974); Atkins v. State, 515 S.W.2d 904 (Tex. Crim. App. 1974); Curlin v. State, 505 S.W.2d 889 (Tex. Crim. App. 1974); Fuery v. State, 464 S.W.2d 666 (Tex. Crim. App. 1971); Casias v. State, 452 S.W.2d 483 (Tex. Crim. App. 1970); Gibson v. State 448 S.W.2d 481 (Tex. Crim. App. 1970); Branch v. State, 445 S.W.2d 756 (Tex. Crim. App. 1969).

Applying these constitutional principles to the case at bar, certain important considerations arise applicable to the punishment phase of appellant's trial. Under the presumption of vindictiveness established in Pearce, supra, if appellant elected to have the trial judge assess punishment on retrial, the maximum he could receive would be fifteen years confinement absent "objective information concerning identifiable conduct on the part of the [appellant] occurring after the time of the original sentencing proceeding." Under the rationale of Chaffin, supra, if appellant elected to have the jury assess punishment on retrial, upon proof of a prior felony conviction, the absolute minimum punishment he could receive would be fifteen years confinement under V.T.C.A. Penal Code, §12.42(c), yet he would be exposing himself to possible confinement for life, or a term of not more that 99 years. Thus, absent identifiable conduct by appellant occurring after his original sentence, the minimum punishment which the jury could have imposed was the maximum punishment the trial court could have imposed. Appellant asserts that his trial counsel rendered ineffective assistance because he

failed to sufficiently advise him of the consequences of electing to have the jury assess punishment. We agree.

At the evidentiary hearing held pursuant to the order of the court of appeals, appellant testified that, after he had been granted a new trial, he had heard from another inmate "that one of them [the judge or jury] would have to, if they was [sic] to find me guilty again, that one of them couldn't give me more time than that I had . . . I forgot which one it was, and that's what made me ask my attorney." Appellant testified that he asked his attorney about this subject on more than one occasion, both before and during trial. Appellant testified that his attorney responded that he didn't know which one could give increased punishment, but that he would check on it. According to appellant, his attorney advised him to elect the jury for punishment because the trial judge was new and was trying to make a name for himself. Appellant testified that he elected the jury for punishment because his attorney advised him to go to the jury because the judge was new.

Appellant's trial counsel testified at the evidentiary hearing. He denied having discussions with appellant regarding whether the judge or the jury would be bound by the prior punishment. Appellant's counsel testified that the decision to have the jury assess punishment came about as follows:

> "Q. Okay. How did the conversation come about; do you remember?
>
> "A. Before we started the trial we had to make an election as required, and we discussed it back and forth as to what would be the best way to go. And at that time the decision was made to go to the jury.

"Q. Did you advise Mr. Jackson to go to the jury specifically?

"A. Specifically, no. I remember discussing it with him. If I recall, it was during the time of the Judge's election campaign, and I believe we discussed the fact that the Judge would be harsher on him, perhaps, than the jury would, and because of headlines, and what have you, that would arise out of the trial. And the decision was made to go to the jury.

* * *

"Q. Okay. Did you at any time—do you remember telling Mr. Jackson that you didn't know which it would be better to go to for sentencing? In others words, did you feel confident with your suggestion to go to the jury?

"A. Yes.

"Q. Why did you recommend going to the jury?

"A. I just explained it.

"Q. For the election reasons?

"A. Yes.

* * *

"Q. Can you think of any other reason why you would have advised him to go to the jury?

"A. No.

"Q. Did Mr. Jackson ever mention to you that he had heard that Judge Barrera had a reputation for handing out heavy sentencing because he was trying to make a name for himself?

"A. It was discussed at that time."
(Emphasis added.)

The judge presiding at appellant's second trial also testified at the evidentiary hearing. He testified that since appellant elected the jury to assess punishment, he never received a presentence investigation report and that, although he knew appellant had a prior criminal record, he did not know the extent of the record, nor did he recall being made aware of any arrests of appellant between the two trials. The trial judge recalled a discussion occurring before the bench by appellant, his attorney, and the prosecutor regarding appellant's election at the time of trial, and it was his "impression that for whatever reason, [appellant] did not want the Court to assess punishment in this case but the jury." (Emphasis added.)

The standard of "reasonably effective assistance of counsel" is used to test the adequacy of representation afforded an accused by retained as well as appointed counsel when the performance is to be judged by the Sixth Amendment right to assistance of counsel made applicable to the states by the Fourteenth Amendment and by the "right to be heard" provision

of Article I, Section 10, Bill of Rights, Constitution of Texas. Ex parte Duffy, 607 S.W.2d 507 (Tex. Crim. App. 1980). Fully stated, the standard for effective counsel is "counsel reasonably likely to render and rendering reasonably effective assistance." Id. at n.14, quoting McKenna v. Ellis, 280 F.2d 592 (5th Cir. 1961). In applying this standard, the adequacy of counsel's service on behalf of an accused must be gauged by the totality of the representation. Ex parte Raborn, 658 S.W.2d 602 (Tex. Crim. App. 1983); Archie v. State, 615 S.W.2d 762 (Tex. Crim. App. 1981). Thus, the constitutional right to counsel does not mean errorless counsel. Ex parte Robinson, 639 S.W.2d 953 (Tex. Crim. App. 1982); Mercado v. State, 615 S.W.2d 225 (Tex. Crim. App. 1981).

In the case at bar the court of appeals concluded, from the facts that were adduced in the trial court, that appellant's counsel's failure to correctly advise appellant of the consequences of electing the jury instead of the judge to assess punishment caused the appellant to be denied effective assistance of counsel as a matter of law.

As this case demonstrates, whether counsel has rendered reasonably effective assistance of counsel is a mixed question of law and fact. See Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674, 700 (1984). Of necessity, a claim of ineffective assistance of counsel must be determined upon the particular circumstances of each individual case. Ex parte Raborn, supra; Benoit v. State, 561 S.W.2d 810 (Tex. Crim. App. 1977). While we hesitate to designate any error as per se ineffective assistance of counsel as a matter of law (and we therefore retreat from any such inference in the language employed by the court of appeals), we hold that the record supports the result the court of appeals reached; that the single

error of omission by appellant's counsel constituted ineffective assistance.

We have recognized the very practical consideration that the criminal defense lawyer controls the progress of a case while the client confronts only three personal decisions: his plea to the charge, whether to be tried by a jury, and whether to testify on his own behalf. See Burnett v. State, 642 S.W.2d 765, n. 8 (Tex. Crim. App. 1982). Clearly the Art. 37.07, §2(b)(2) election is a choice belonging to the defendant, encompassed within the personal decision of whether to be tried by a jury.[2]

In Ex parte Dunham, 650 S.W.2d 825 (Tex. Crim. App. 1983), we considered a claim of ineffective assistance of counsel based upon an attorney's advice persuading an accused to waive his right to jury trial in order to avoid preparing for voir dire. Among the factors considered in assessing this claim were: (1) whether advice was given which would promote an understanding of the law in relation to the facts, (2) whether the advice was reasonably competent, and (3) whether the advice permits

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2. Article 37.07, §2(b), V.A.C.C.P., provides in pertinent part:
"(b) Except as provided in Article 37.071 [Procedure in Capital Case], if a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense; provided however, that . . . (2) in . . . cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury." (Emphasis added.)

an informed and conscious choice. In Dunham, supra, we sustained the contentions of ineffective assistance noting:

> ". . . Applicant's counsel convinced applicant to waive his right to a jury trial, even though such a waiver would not be advantageous to the applicant in any way, and would probably be sure to be disadvantageous. It is clear that applicant was not given competent advice and thus applicant was prevented from making an informed and conscious choice regarding his right to jury trial."

We believe this analysis should also apply to the very valuable statutory right of election under Art. 37.07, §2(b)(2), V.A.C.C.P. For the Texas statutory right of election to be meaningful, it must be an informed decision, intelligently made, with full knowledge of the circumstances, options, and consequences. The impact of Pearce, supra, is certainly relevant to an informed and conscious choice regarding appellant's right of election on retrial.

A criminal defense lawyer must have a firm command of the facts of the case as well as governing law before he can render reasonably effective assistance to his client. Ex parte Lilly, 656 S.W.2d 490 (Tex. Crim. App. 1983); Ex parte Ybarra, 629 S.W.2d 943 (Tex. Crim. App. 1982); Ex parte Duffy, supra. The responsibility of having a firm command of the facts of the case as well as governing law in order to assist and advise one criminally accused is not one placed on the State. See Wooldridge v. State, 653 S.W.2d 811, n. 7 (Tex. Crim. App. 1983). See also Ex parte Duffy, supra. We must, therefore, charge appellant's attorney with knowledge of the constitutional principles applicable to punishment on retrial and the duty to advise appellant of the

impact and consequences of electing to have the jury assess punishment in this case.

Appellant's attorney did advise him about the punishment attitudes and reputation of the trial judge in this case, a very important factor to consider in the election decision. The record clearly shows, however, that appellant's attorney failed to advise him regarding the prophylactic protections of Pearce applicable to the trial judge and the contrasting wide open punishment discretion vested in the jury.[3] Thus, the advice did

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3. The dissent complains about the non-final decision of this Court in Castleberry v. State, ____ S.W.2d ____, (Tex. Crim. App., No. 166-83, delivered July 18, 1984), and its relationship to the Pearce holding. The unique facts and limited holding of Castleberry do not control the instant case. In Castleberry, the defendant wrote a letter to the trial judge six days after his conviction complaining he had gotten a "bad deal." In the instant case, appellate briefs had been filed before the trial court granted a new trial. Certainly, under our former appellate procedure, if the trial court granted a new trial after the filing of appellate briefs, Pearce has application. See Art. 40.09, §12, V.A.C.C.P. (1965)(The record on appeal — trial court's duty). In any event, Castleberry is pending rehearing and as such is not yet authoritative.

The court of appeals in this case held that counsel's error demonstrated an "obvious lack of knowledge of the applicable legal principles governing punishment on retrial." Nothing in this record rebuts that conclusion. The dissent's suggestion that counsel may have interpreted Pearce as applicable only to reversals upon appeal by a higher court is surprising in light of the dissenter's strong belief in staying within the record.

not promote an understanding of the law in relation to the facts and the advice did not permit an informed and conscious choice.[4] As a result, appellant made a decision which resulted in a sentence ten years greater than he would have received had he gone to the court for punishment. Considering the court of appeals' finding that there was no objective information concerning identifiable conduct of the accused between the two trials and that, therefore, the trial judge was locked into giving the minimum sentence of 15 years, there is more than a reasonable probability that, but for counsel's advice, the result of the proceedings would have been different (i.e. the sentence would have been 10 years less). Strickland, supra at ____, 104 S.Ct. at 2068.[5]

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4. The State asserts, and the dissent as much as argues, that inasmuch as the record reflects appellant had been arrested for theft subsequent to his first sentencing proceeding, the trial judge was not bound by Pearce and electing the jury was the result of trial strategy. We need not consider today the State's contention that an arrest is "identifiable conduct" within the meaning of Pearce, nor do we consider whether an arrest is an "event" within the meaning of Wasman v. United States, ____ U.S. ____, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984), sufficient to overcome the presumption of vindictiveness and justify an increased sentence. The relevant inquiry here is whether appellant's attorney counseled him on these matters and gave him advice which was the product of trial strategy. The record, including the State's complete cross examination of appellant, his attorney, and the trial judge at the evidentiary hearing ordered by the court of appeals, clearly indicates that nothing except "the [judge's] election reasons" were considered in electing the jury in this case. See also footnote 5.

5. The dissent surprisingly ignores the record of the

[Footnote 5 continued]

hearing ordered by the court of appeals in a paragraph beginning: "Turning to the objective information about identifiable conduct on the part of the appellant after the time of the original sentencing, . . . ". The hearing, ordered specifically to develop such evidence if it existed, revealed none. After review of the evidentiary hearing, ordered to establish whether appellant engaged in intervening identifiable conduct, the court of appeals held there was no identifiable conduct by appellant which would have allowed increased punishment by the trial court. That this holding is correct cannot seriously be disputed. The dissent would point to "evidence" in the record that appellant failed to appear for a trial setting and was surrendered by the sureties on his bond. We decline to elevate same to the status of "evidence" because same were never developed as a factual matter at appellant's trial or at the evidentiary hearing ordered by the court of appeals. Nor has this "evidence" been alleged or briefed as identifiable conduct before the court of appeals, or before this Court on the State's petition for discretionary review, either by the locally affected district attorney or the State's prosecuting attorney. As is obvious from the record, the parties to this protracted litigation do not rely upon this "evidence" as identifiable conduct. Likewise, the evidentiary value of appellant's arrest, as it bears upon the issue of identifiable conduct, is nil. This is especially true since appellant denies committing the offense, has never been prosecuted for the crime, and no testimony was offered at the evidentiary hearing to even indicate appellant did commit the offense. Additionally, absolutely no legitimate inference can be drawn from the prosecutor's unanswered inquiry about five arrests "for such things as aggravated assault, felony theft...," because nothing in the record even supports the question. In short, any argument that appellant engaged in conduct sufficient to remove the presumption of Pearce, or was concerned that evidence of identifiable conduct might be introduced by the State at the punishment phase, is speculative, unfounded and outside the record.

We have held that an accused may be denied effective assistance of counsel because of errors occurring solely in the punishment phase of trial. See Ex parte Scott, 581 S.W.2d 181 (Tex. Crim. App. 1979)(failure to investigate the circumstances underlying convictions used for enhancement). See also, Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 736, 79 L.Ed.2d 195 (1984). We have also recognized that, as a practical matter, some isolated omissions may so affect the outcome of a particular case as to undermine the reliability of the proceedings. See May v. State, ____ S.W.2d ____ (Tex. Crim. App. No. 113-84, delivered December 5, 1984)(failure to have defendant's application for probation sworn). See also, Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979)("Sometimes a single error is so substantial that it alone causes the attorney's assistance to fall beow the sixth amendment standard."). In this case, we must agree with the court of appeals that the failure of appellant's attorney to sufficiently advise him as to the consequences of electing to have the jury assess punishment permeated the entire proceeding and rendered counsel's assistance ineffective.[6]

As the court of appeals held, since the jury assessed punishment, upon reversal the proper remedy is to remand for

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6. The dissent concludes with an accusation that today we set the stage for a multitude of claims of ineffective assistance of counsel based on one error. The stage for reversal due to a single error of counsel, so severe in its consequenses that it

[Footnote 6 continued on page A-33]

[Footnote 6 continued]

permeates the entirety of his representation, has long been set. "Sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard." Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979)(emphasis supplied). Last year, in May v. State, ____ S.W.2d ____ (Tex. Crim. App. No. 113-84, delivered December 5, 1984), this Court considered "whether counsel's failure to have [the defendant's] motion for probation sworn to constituted ineffective assistance of counsel." Without discussing counsel's overall representation at trial, we noted that this error was "not the result of trial strategy" and held counsel had not rendered effective assistance of counsel. Thus, in May, a single error of omission occurring at the punishment phase of trial, for which there was no trial strategy, and which might have caused the result of the proceedings to be different (i.e., the jury might have granted probation) and therefore materially harmed the accused's constituted ineffective assistance of counsel. In the case at bar, a single error of omission occurring at the punishment phase of trial, for which there was no trial strategy, and which did unquestionably cause the result of the proceedings to be different (i.e., an almost two-fold increase in punishment) materially harmed the appellant, and constituted ineffective assistance of counsel.

Fortunately, history shows that single errors of such magnitude are rare. However, to ignore such a single error simply because it is single, while granting relief where multiple errors cumulatively reach the same magnitude, seems contrary to the very reasons that caused the creation of the doctrine of ineffective assistance of counsel.

As for the dissent's reliance on Strickland v. Washington,

[Footnote 6 continued on page A-34]

new trial. Bullard v. State, 548 S.W.2d 13 (Tex. Crim. App. 1977), rev'd on other grounds, 665 F.2d 1347 (5th Cir. 1982), vacated,

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[Footnote 6 continued]

____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), it is cogent to note that in outlining practical considerations for the application of its two-pronged test for ineffective assistance of counsel, the Supreme Court stated that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." The prejudice standard, as constructed by the Supreme Court, requires that:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

104 S.Ct. at 2068.

Can it be said that appellant has failed to demonstrate prejudice? Is not counsel's error the "but for" cause of appellant's increased punishment? Are we confident in the outcome of the proceedings?

The sockdolager is simply this:

> "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned whether, despite the strong presumption of reliability, the result of the particular

[Footnote 6 continued on page A35]

459 U.S. 1139, 103 S.Ct. 776, 74 L.Ed.2d 987 (1983).[7]

The judgment of the court of appeals is affirmed.

Miller, Judge

Delivered: July 24, 1985

En Banc

Publish

White. J. not participating

[Footnote 6 continued]

> proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."

104 S.ct. at 2069.

7. In a supplemental brief to the State's petition, the State's attorney argues that since the election decision belongs solely to the appellant, he could simply elect to have the jury assess punishment in the event of further retrial, and if assessed punishment in excess of fifteen years, could again allege ineffective assistance of counsel and obtain still another reversal. We disagree. While it is true that the Art. 37.07, §2(b)(2) election decision belongs solely to the accused, the relevant inquiry is whether he makes an informed and intelligent choice with knowledge of the relevant factors. As noted above, we reject the notion of "automatic" ineffective assistance of counsel. In this vein we note, however, that a careful counsel or trial judge judge should ensure that the record reflects an accused's awareness of the exposure to greater punishment on retrial if the jury is elected.

KENNETH EARL JACKSON,
Appellant

No. 115-84 Vs.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review from the Court of Appeals, Fourth Supreme Judicial District of Texas (BEXAR County)

DISSENTING OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

Appellant was convicted of the actual delivery of heroin, a controlled substance, a first-degree felony. See Article 4476-15, § 4.03(b), V.A.C.S. One prior felony conviction was alleged and proved for the enhancement of punishment. The jury assessed punishment at 25 years' confinement in the Texas Department of Corrections. V.T.C.A., Penal Code, § 12.42.

On appeal in three grounds of error appellant urged, through his appointed appellate counsel, the ineffective assistance of his trial counsel. In his fourth ground of error appellant attacked the sufficiency of the evidence to sustain the conviction.

The San Antonio Court rejected the sufficiency issue but abated the appeal for an evidentiary hearing concerning his first ground of error relating to the ineffective assistance of counsel. The other two grounds of error were not reached. Jackson v. State, 640 S.W.2d 323 (Tex. App.—San Antonio 1982, pet. ref'd.).

His first of ground of error urged ineffective assistance of counsel because appellant was not advised sufficiently as to the

consequences of electing to have the jury assess punishment in the event of a conviction. He alleged the appeal was from his conviction at a second trial for the same offense; that at his first trial the court had assessed his punishment at 15 years' imprisonment as a repeat offender; that subsequently the trial court had granted him a new trial pursuant to former Article 40.09 § 12, then in existence; that in light of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), and Miller v. State, 472 S.W.2d 269 (Tex. Crim. App. 1971), the trial court could not assess more that 15 years' imprisonment, the minimum punishment for a first-degree felony, enhanced by one prior felony conviction and there was no reason to elect the jury to assess punishment at the second trial. Yet appellant contends his appointed counsel at the second trial had not sufficiently advised him and he chose the jury who assessed punishment at twenty-five years' imprisonment to his detriment.

After discussing Pearce, the Court of Appeals wrote:

> "Therefore, a hearing should be conducted in the trial court to establish whether objective information could have been made available to the trial court which might have resulted in the imposition of a more severe punishment than the fifteen years assessed at the first trial and thereby determine whether there was a reasonable basis for trial counsel's action. As a result, this appeal is abated and a hearing ordered in the trial court for this purpose."

At the time of the remand the record was meager as to evidence of a previous trial. The docket sheet reflects no earlier

trial. No judgment, sentence or order granting new trial, etc., are in the record. There was a reference to a statement of facts from a previous trial, but it was not introduced.

The hearing on the motion for new trial in the instant case does relect that appellant was originally indicted in Cause No. 77-CR-1066 for delivery of heroin with a "repeater" allegation in the 144th District Court; that on March 16, 1978, appellant entered a plea of not guilty before the court; that on March 24, 1978, 15 years was assessed as punishment by the trial judge; that subsequently a motion for new trial was overruled; that a hearing on motion for new trial filed by "appellate" counsel was conducted; that on December 3, 1979, a new trial was granted by the trial judge, apparently under Article 40.09, supra, then in existence. There was some indication in the testimony the word "actually" had been left out of the indictment for delivery of heroin resulting in the trial judge's action in granting the new trial. The clerk of the court testified Cause No. 77-CR-1066 was "reinstated" under Cause No. 77-CR-3150 and subsequently "reinstated" in Cause No. 80-CR-0934 under which indictment the instant trial had been conducted.

At the time of remand there was evidence in the record that after the indictment in 80-CR-0934 the appellant failed to appear for a trial setting and a bond forfeiture was ordered and a capias issued for his arrest on September 29, 1980. He was surrendered on October 21, 1980, by the sureties on his bond. See V.T.C.A., Penal Code, § 38.11 (Bail Jumping and Failure to Appear). At trial one police officer-witness referred to a pending theft charge against the appellant. This was the only evidence of possible identifiable conduct on the part of the appellant after the first sentence was imposed.

On August 26, 1983, at the evidentiary hearing ordered by the Court of Appeals, the appellant, who was already on parole on his 25 year sentence, testified that prior to the second trial he had heard from another inmate or prisoner that either the judge or jury would have to give him the same amount of time as at the first trial, but he could not remember which one it was, that he asked his counsel about it. The attorney promised to check on it as he didn't know and asked appellant to do the same thing. Appellant testified he mentioned this matter to his counsel several times and received no answer. He did relate that his counsel told him that the judge was trying to make a name for himself, and he heard in jail the judge "was kind of rough" so he "picked the jury" after counsel advised him to do so.

Appellant testified the judge at his first trial was Judge Hippo Garcia and that the second trial judge was Judge Roy Barrera, and that it was Barrera that he heard the talk about in jail.

Appellant's second trial counsel testified at the evidentiary hearing. The record reflects:

> "Q. But did he (appellant) actually inform you that someone had told him that he should choose one or the other and he asked you which one it was?
>
> "A. No. The conversation didn't come about that way."

Counsel stated they discussed an election before the trial started and a decision was made to go to the jury, that it was

during the time of the Judge's election campaign" and the fact was discussed the judge would be harsher than the jury. He explained his recommendation was based on "election reasons." He acknowledged they had discussed the fact Judge Barrera "had a reputation for handing out heavy sentencing because he was trying to make a name for himself." Counsel stated he left the decision to the appellant though he had suggested the jury. His interrogation ended with:

> "Q. Can you think of any other reasons why you would have advised him to go to the jury?
>
> "A. No."

Judge Roy Barrera, Jr., testified he was the trial judge at appellant's second trial on January 13, 1981, that he had been judge of the 144th District Court since October 22, 1980. He stated the trial was about three months after his appointment and "I hardly doubt that I was in the middle of an election year campaign." Judge Barrera recalled a discussion in front of the bench about the election of judge or jury, and it was his recollection the appellant wanted the jury to assess punishment.

The evidentiary hearing did not develop very well the evidence as to objective information about identifiable conduct by the appellant between the time of the first sentencing and the second.

At the evidentiary hearing appellant admitted he had been arrested for theft during the time period in question, denied his guilt, and stated after his 25 year conviction the theft charges had been dismissed. When Judge Barrera testified he was asked

by the prosecutor whether he had not received presentence report information that during the time period in question appellant had been arrested five times "for such things as aggravated assault, felony theft . . . ," the judge pointed out that it was a jury trial and he had not requested a presentence report.

The State did not further attempt to develop this line of testimony though that apparently had been the principal objective of the Court of Appeals. Further, appellant's trial counsel was never interrogated as to whether he was aware of the Pearce decision or had researched that area of law. The indictment, judgment, sentence, order granting new trial or other papers from the first trial were never introduced into evidence.[1]

Following the evidentiary hearing, the Court of Appeals agreed with appellant's first ground of error and noted that the trial judge could not have imposed a more severe penalty on the appellant at the second trial absent objective information concerning identifiable conduct on the part of the appellant after the time of the first sentence, and that appellant's counsel did not advise him as to this matter. The Court of Appeals then held that appellant was, as a matter of law, denied the effective assistance of counsel.

Recognizing the standards applied in the past to claims of ineffective assistance of counsel, the court nevertheless wrote:

"It is true that in the case before us we have

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1. It appears the State had ineffective assistance of counsel at the evidentiary hearing.

> singled out one error of counsel upon which we base this holding. In our opinion, however, this single error of counsel permeates the entire proceeding below and demonstrates an obvious lack of knowledge of the applicable legal principles governing punishment on retrial by appellant's attorney." Jackson v. State, 662 S.W.2d 74 (Tex. Crim. App. 1983).

The Court of Appeals reversed the conviction without reaching appellant's ground of error 2 and 3 also claiming ineffectiveness of counsel even though acknowledging effectiveness of counsel is to be judged by the totality of representation.

The majority of this Court now affirms the judgment on the Court of Appeals stating:

> "While we hesitate to designate any error as per se ineffective assistance of counsel as a matter of law (and we therefore retreat from any such inference in the language employed by the court of appeals), we hold that the record supports the result the court of appeals reached; that the single error of omission by appellant's counsel constituted ineffective assistance. . . ."

We have now abandoned or seriously undermined our standards for passing on questions of ineffective assistance of counsel. A single error on counsel's part as viewed by an appellate court may necessitate a reversal of a case without considering the totality of the representation, other claims of ineffective assistance, provided the one envisioned error is big

enough, bad enough in the eyes of appellate judges.

Appellant's counsel is faulted for allowing appellant to opt for the jury to assess punishment rather than the trial judge which resulted in a 25 year sentence rather than the 15 years the trial judge would have been limited to in light of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), and its progeny. It surely cannot be argued that without the applicability of Pearce counsel's action would not call for reversal.

Pearce involved the reversal of a conviction by a higher court on appeal. It first should be observed that in the instant case there was no reversal of the conviction by an appellate court. The first trial judge granted a new trial before he was succeeded on the bench by another judge some 10 months later.

If counsel is faulted for not seeing the applicability of Pearce to the case, it should be noted that as late as July 18, 1984, a majority of this Court (7-2)[2] in Castleberry v. State, ____ S.W.2d ____ (No. 166-83, 7/18/84), wrote:

> "We conclude the rationale of Pearce does not and cannot apply to the instant case simply because appellant never exercised his statutory or constitutional right to review by a higher court. Therefore, what happened to him in terms of increased punishment cannot under any interpretation be attributed to any unconstitutional response

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2. This writer and judge Teague dissented.

to exercise of those rights—a response condemned in Pearce." (Emphasis supplied.)

Castleberry is now pending rehearing.[3] Regardless of what action is taken on rehearing, can counsel be faulted if he interpreted Pearce as applicable only to reversals upon appeal by a higher court? If he is faulted, then he is in good company.

Further, the new trial was granted by the first trial judge apparently because of a fundamental defect in the indictment.

Over 10 months later a new judge assumed the bench of the trial court, and the second trial commenced 13 months later upon a new indictment. Is it likely that the second trial judge would consider himself to have a "personal stake" in the prior conviction or a "motivation to engage in self-vindication"? See and cf. Chaffin v. Stynchcombe, 412 U.S. 17, 27, 93 S.Ct. 1977,

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3. In the past this Court has applied Pearce where a new trial was granted by the trial court without an appeal. See, e.g., Payton v. State, 506 S.W.2d 912 (Tex. Crim. App. 1974); Ex parte Bowman, 523 S.W.2d 677 (Tex. Crim. App. 1975); Moore v. State, 527 S.W.2d 529 (Tex. Crim. App. 1975); Lechuga v. State 527 S.W.2d 529 (Tex. Crim. App. 1975); Palm v. State, 656 S.W.2d 429 (Tex. Crim. App. 1981). The rationale of extending Pearce in these cases was not discussed, however, it (rationale) was discussed in McCullough v. State, 680 S.W.2d 439, 397 (Tex. App.—Amarillo 1983), by Justice Countiss for the court in the opinion on rehearing which cause was reversed on other grounds. McCullough v. State, ____ S.W.2d ____ (Tex. Crim. App. No. 351-83, 12/5/84), cert. granted, ____ U.S. ____ (June 10, 1985). Castleberry, on original submission, overruled these cases sub silentio.

36 L.Ed.2d 714 (1973); Wasman v. United States, ____ U.S. ____, 104 S.Ct. 3217, 3222, ____ L.Ed.2d ____ (1984). While appellant did not expressly concede the second trial judge was not vindictive because the prior conviction had been set aside, see Moon v. Maryland, 398 U.S. 319, 90 S.Ct. 1730 ____ L.Ed.2d ____ (1970), he made no claim that Judge Barrera was vindictive on this basis. It is true that in Bingham v. State, 523 S.W.2d 948 (Tex. Crim. App. 1975), the rule of Pearce was applied where there were two different judges. The conviction was obtained in a trial before a "visiting" judge. On appeal the cause was remanded by this Court, not for a new trial, but reassessment of punishment because of the improper admission of certain evidence. Upon remand, the "regular" judge of the court increased the punishment although aware of the earlier sentence and without evidence of identifiable conduct on the part of the defendant after time of original sentence. No other rationale was offered.

It has been said the major purpose of the Pearce doctrine is to prevent an increased penalty on retrial from being the product of retaliation or vindictiveness on the part of the sentencing judge who was offended by the accused's successful efforts in securing a new trial. Casias v. Beto, 333 F.Supp. 214 (N.D.Tex. 1971), aff'd. 459 F.2d 54 (5th Cir. 1972), cert. den. 410 U.S. 970, 93 S.Ct. 1450, 35 L.Ed.2d 706 (1973). Can it be said Judge Barrera was offended by the granting of a new trial by Judge Garcia?

The Pearce rule, of course has been read to apply a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence. United States v. Goodwin, 457 U.S. 368, 374, 102

S.Ct. 2485, 2489, 73 L.Ed.2d 74 (1982). See Wasman v. United States, supra, at p. 3221. In Wasman, a plurality opinion, Chief Justice Burger wrote:

> "If it was not clear from the Court's holding in Pearce, it is clear from our subsequent cases applying Pearce that due process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights. In Pearce and in Blackledge,[4] the Court 'presumed' that the increased sentence and charge were products of actual vindictiveness aroused by the defendants' appeals. it held that the defendants' right to due process was violated not because the sentence and charge were enhanced, but because there was no evidence introduced to rebut the presumption that actual vindictiveness was behind the increases; in other words, by operation of law, the increases were deemed motivated by vindictiveness. In Colten,[5] Chaffin,[6] Bordenkircher,[7]

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4. Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974).

5. Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972).

6. Chaffin v. Stynchcombe, 414 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973).

7. Bordenkercher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

and Goodwin,[8] on the other hand—where the presumption was held not to apply—we made clear that a due process violation could be established only by proof of actual vindictiveness.

> "In sum, where the presumption applies, the sentencing authority or the prosecutor must rebut the presumption that an increased sentence or charge resulted from vindictiveness; where the presumption does not apply, the defendant must affirmatively prove actual vindictiveness."

Five justices concurred in the result of Wasman that a sentence may be increased on retrial based on an intervening event as well as intervening conduct, but in substance stated the Pearce presumption is not simply concerned with actual vindictiveness, but is also intended to protect against reasonable apprehension of vindictiveness that could deter a defendant from seeking a new trial. Thus the Supreme Court justices too are not in agreement as to the proper application of Pearce. Needless to say, "Pearce is not without its ambiguities; . . ." Wasman, supra, at 104 S.Ct. at p. 3224. It would not be surprising if counsel had difficulty in determining if Pearce had application to the circumstances in the instant case.

Turning to the objective information about identifiable conduct on the part of appellant after the time of the original sentencing, it is first noted there was a failure to appear and an ordered bond forfeiture. Appellant was later surrendered by

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8. United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 14 (1982).

the sureties on his bond, all within the prescribed time period. Such conduct may well have constituted a violation of V.T.C.A., Penal Code, §38.11 (Bail Jumping and Failure to Appear). Surely appellant and his counsel were aware of this conduct. At the evidentiary hearing appellant admitted he had been arrested for theft after the first trial, but claimed his innocence and dismissal of the pending charges after the imposition of the 25 year sentence at his second trial. Appellant and his counsel were obviously aware of these pending charges at the time of the second trial. There was reference in a question at the evidentiary hearing to appellant's five arrests after the first trial. These facts, of course, were not developed. Besides other problems with Pearce, counsel may well have concluded that if the judge had chosen to assess punishment, and there had been an insistence on his part that the judge was limited to 15 years under the Pearce rule, the State could have proved "identifiable conduct" after the first trial. In that situation the judge may have assessed a harsher punishment than the jury actually did. Can it really be said that counsel's action was without the wide range of reasonable professional assistance?[9]

The majority views counsel's action in the case as error, and a single error that, standing alone, deprived the appellant of

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9. Upon the retrial now authorized by the majority the appellant will be guaranteed no greater punishment than 15 years if convicted. The State will be authorized to demonstrate objective information about identifiable conduct or event since the trial of original sentence. If this is done the trial judge will not be limited to 15 years, and of course, if a jury is chosen again the jury may impose a penalty with the entire range of punishment.

the effective assistance of counsel. While the majority "retreats" from the "matter of law" approach of the Court of Appeals, it nevertheless seems to depart from the adopted standard for effective counsel—"counsel reasonably likely to render and rendering reasonably effective assistance." Ex parte Duffy, 607 S.W.2d 507 (Tex. Crim. App. 1980). Cf. Strickland v. Washington, ____ U.S. ____ 104 S.Ct. 2052, 2070, 80 L.Ed.2d 670 (1984). The majority acknowledges that each claim of ineffective assistance of counsel must be determined upon the particular circumstances of each case. Benoit v. State, 561 S.W.2d 810 (Tex. Crim. App. 1977); Ex parte Raborn, 658 S.W.2d 602 (Tex. Crim. App. 1981). And we know that the constitutional right to counsel does not mean errorless counsel, and ineffectiveness is not to be determined by hindsighted comparison with how other counsel might have tried the case. Benoit v. State, supra; Boles v. State, 598 S.W.2d 274, 279 (Tex. Crim. App. 1980); Hawkins v. State 660 S.W.2d 65 (Tex. Crim. App. 1983). And most importantly, the adequacy of counsel's service on behalf of an accused must be gauged by the totality of representation, rather than isolated acts or omissions. Boles v. State, supra; Benoit v. State, supra; Ex parte Raborn, supra; Archie v. State, 615 S.W.2d 762 (Tex. Crim. App. 1981).

What was said in Strickland v. Washington, supra, 104 S.Ct. at p. 2065-66, is here instructive.

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a partic-

ular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's counsel falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' See Michel v. New York, supra, 350 U.S. at 101, 76 S.Ct. at 164. There are countless ways to provide effective asssistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983)."

Since totality of representation is the proper basis for inquiry Boles, v. State, supra, I cannot agree, given the circumstances of this case, that the error, if any, was such, standing alone, as to call for reversal on the basis of ineffective assistance of counsel. The Court of Appeals never considered grounds of error 2 and 3 also dealing with claims of ineffective assistance of counsel. I would remand to that court to consider those grounds and reconsider this ground of error under the totality of representation test.

I dissent most vigorously to the majority prying open Pandora's box and setting the stage for the multitude of claims of ineffective counsel based on one error.

ONION, Presiding Judge

W. C. Davis, J., joins this dissent.

(Delivered July 24, 1985)

En banc

Publish

KENNETH EARL JACKSON,
Appellant

No. 115-84 v.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review from the Court of Appeals, Fourth Supreme Judicial District of Texas

(Bexar County)

DISSENTING OPINION ON
STATES'S PETITION FOR DISCRETIONARY REVIEW

I join wholeheartedly the opinion of the Presiding Judge wherein he dissents from the opinion of the majority. To hold from the meager record before us that there was no tactical reason for the attorney to advise the appellant to select the jury for punishment ignores the reality of what is present. Obviously, from the references in the record to an intervening arrest, there was quite probably a reason to select the jury rather than the judge who, with the benefit of a pre-sentence investigation, could very well have lived up to the reputation the parties have attempted to give him.

We are not here concerned with whether North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) has application. The judge did not impose a longer prison sentence than the appellant originally received. The jury did. Thus we need not address any issue of vindictiveness but need only consider the effective assistance of counsel issue. In light of the picture that has been painted, it is quite probable that appellant received most effective assistance of counsel if in fact there were intervening factors which could have been brought to the attention of a judge which would not otherwise be admissible pursuant to Article 37.07 V.A.C.C.P.

Further, since the majority has now concluded that the most this appellant could receive is fifteen years, and since the minimum is fifteen years, why do they not opt to merely reform the judgment to reflect, as they determined, the only punishment available?

What concerns me more, however, is whether, upon retrial, counsel will be determined to be ineffective if he advises appellant to choose the judge to assess punishment knowing that a reversal of any conviction will be automatic if he chooses a jury and jury assess any punishment greater that fifteen years. To allow the manipulation of our system as has been done by this appellant is to ignore our duties as judges both to the law and to the administration of justice.

For these additional reasons, I dissent.

McCormick, Judge

(Delivered July 24, 1985)

En Banc

Publish

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 0115-84

STYLE: Jackson, Kenneth Earl

October 16, 1985

On this day State's Motion for Rehearing was denied. Presiding Judge Onion and Judge McCormick dissent.

Thomas Lowe, Clerk

Court of Criminal Appeals

Austin, Texas

NUMBER 0115-84

Kenneth Earl Jackson

COURT OF APPEALS NO. 04-81-00373-CR

On this 30th day of October, 1985, came on to be considered the motion of the Assistant District Attorney to stay execution of mandate.

AND SUCH MOTION IS HEREBY GRANTED, mandate is stayed for a period of sixty days for the State to file a petition for writ of certiorari and is stayed until final action by the United States Supreme Court.

IT IS SO ORDERED.

PER CURIAM

A TRUE COPY ATTEST:

THOMAS LOWE, CLERK
COURT OF CRIMINAL APPEALS

Article 37.07, Sections 1 and 2, of the
Code of Criminal Procedure of Texas:

Sec. 1. (a) The verdict in every criminal action must be general. When there are special pleas on which a jury is to find they must say in their verdict that the allegations in such pleas are true or untrue.

(b) If the plea is not guilty, they must find that the defendant either guilty or not guilty, and, except as provided in Section 2, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty.

(c) If the charging instrument contains more than one count or if two or more offenses are consolidated for trial pursuant to Chapter 3 of the Penal Code, the jury shall be instructed to return a finding of guilty or guilty in a separate verdict as to each count and offense submitted to them.

Sec. 2. (a) In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed.

(b) Except as provided in Article 37.071, if a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense; provided, however, that (1) in any criminal action where the jury may recommend probation and the defendant filed his sworn

motion for probation before the trial began, and (2) in other cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.

(c) Punishment shall be assessed on each count on which a finding of guilty has been returned.